Supreme Court, U.S.
FILED

NO. 931393 MAR 7 1994

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

STEPHEN AND MALVINA GALLODORO
Petitioners

vs.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EVANGELINE M. VAVRICK
LAW OFFICES OF
EVANGELINE M. VAVRICK
912 Louisiana Avenue
New Orleans, LA 70115
Telephone: (504) 899-5555

Attorney for Petitioners
Stephen and Malvina Gallodoro

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

28 pp

QUESTIONS PRESENTED FOR REVIEW

Is there requisite federal diversity jurisdiction when the plaintiffs are members of the defendant mutual insurance company by virtue of the payment of a membership fee entitling the plaintiffs to voting rights and participation in the profits of the mutual?

II.

Must there be an evidentiary hearing to determine both state of incorporation and principal place of business before a federal district court accepts jurisdiction?

III.

Do the provisions of U.S.C.A. 28:1332 C(1) establish the domicile of the defendant as a matter of law when the action is a direct action by the insured against his liability carrier under the uninsured motorist provisions and medical pay provisions of the insured's liability policy?

LIST OF PARTIES

The following are the parties to this proceeding:

Stephen and Malvina Gallodoro
Petitioners

State Farm Mutural Automobile Insurance Company
Respondent

Evangeline M. Vavrick
Law Offices of Evangeline M. Vavrick
912 Louisiana Avenue
New Orleans, Louisiana 70115
Attorney for Petitioners

Matthew J. Ungarino
Law Offices of Matthew J. Ungarino
1470 One Lakeway Center
3900 North Causeway Boulevard
Metairie, Louisiana 70001
Attorney for Respondent

Patrick J. Sanders
Law Offices of Matthew J. Ungarino
1470 One Lakeway Center
3900 North Causeway Boulevard
Metairie, Louisiana 70001
Attorney for Respondent

David Ira Bordelon
Law Offices of Matthew J. Ungarino
1470 One Lakeway Center
3900 North Causeway Boulevard
Metairie, Louisiana 70001
Attorney for Respondent

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

DECISIONS BELOW 1

JURISDICTION 1

STATUTES PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 2

REASONS WHY WRIT SHOULD BE GRANTED ... 6

ARGUMENT 8

CONCLUSION 17

PROOF OF SERVICE 18

APPENDIX "A" A-1
Opinion of the U.S. Fifth Circuit Court of Appeal

APPENDIX "B" A-3
Ruling of the United States District Court for the Eastern District of Louisiana

TABLE OF AUTHORITIES

Cases	Page
B. Inc. v. Miller Brewing Co., 663 F.2d 545, 548 (5th Cir. Unit A 1981)	9
Buckley v. Control Data Corp., 923 F.2d 96	7,15
Carden v. Arkoma Associates, 494 U.S. 185, 110 S. Ct. 1015, 108 L.Ed. 2d 157 (1990)	6,14
Erie R.R. Co. v. Tompkins, 304 U.S. 64 58 S.Ct. 817, 82 L.Ed. 1188	
Getty Oil, 841 F.2d at 1259	7,9
Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed. 2d 8	
Kaplan v. Industrial Risk Insurers, 86 F.R.D. 484	14
Mas v. Perry, 489 F.2d 1396, 1398-99 (5th Cir. 1974). cert. denied, 419 U.S. 842, 95 S.Ct. 74, 42 L.Ed 2d 70 (1975)	12
Newport Ltd. v. Sears, Roebuck & Co., 941 F.2d 302, 307 (5th Cir. 1991)	7,14,15
Public Housing Administration v. Housing Authority of Bogalusa, 137 S.2d 315	14

TABLE OF AUTHORITIES (continued)

Cases **Page**

Russel, 288 U.S. at 480, 53 S.Ct. at 448 14

Stafford v. Mobil Oil Corp., 945 Fd. 2d 803 7,9,14,15

Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806).....12

Temple Drilling Company v. Louisiana Insurance Guaranty Association 946 Fed. 2d 390.....7,14,15

Vieer v. Horney Ester Construction, 69 F.P.D. 370 ...13

Whalen v. Carter, 954 F.2d 1087 7,11,14,15

Statutes

U.S.C.A. 28:1332 1

U.S.C.A. 28:2101 C 1

U.S.C.A. 28:1254 (1) 1

DECISIONS BELOW

The per curiam opinion of the United States Court of Appeal, Fifth Circuit, is reproduced in Appendix A.

The order of the United States District Court, Eastern District of Louisiana, denying the motion to remand is unreported and is reproduced in Appendix B.

JURISDICTION

Petitioners seek review of the judgment of the United States Court of Appeal, Fifth Circuit, entered on December 7, 1993.

This Petition is timely filed pursuant to 28 U.S.C.A. 2101(C). This Court's jurisdiction is invoked pursuant to 28 U.S.C.A. 1254(1).

STATUTES PRESENTED FOR REVIEW

TITLE 28, Section 1332-A(1) and C(1)

Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between -

(1) citizens of different states;

(c) For the purposes of this section and section 1441 of this title -

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that *in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen,* as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business;

STATEMENT OF THE CASE

State Farm Mutual Automobile Insurance Company is a domestic unincorporated Illinois mutual which was organized in 1922 in Bloomington, Illinois pursuant to Articles of Association filed with the Insurance Commissioner. A certificate of insurance was thereafter issued by the Commissioner.

State Farm has never been issued a corporate charter by the State of Illinois nor has it qualified to do business in Louisiana as a foreign corporation.

Respondent operates in the State of Louisiana by virtue of a certificate of insurance issued to it by the Insurance Commissioner of the State of Louisiana.

Respondent is the largest single automobile insurer in Louisiana and maintains its Southeastern Regional Of-

fice in Monroe, Louisiana at 22 State Farm Boulevard which is also its address for service of process.

State Farm is a major Louisiana property owner, a property taxpayer and a major Louisiana employer.

To join the mutual insurance group an insured is required to pay a membership fee which entitles the insured to voting rights at the annual meeting held at the home office in Bloomington, Illinois and participation in the profits of the association by paying reduced insurance premiums or receiving payments of dividends.

Petitioners joined the mutual by paying the requisite membership fees and premiums and were insured members for approximately 20 years.

The policy of insurance issued by State Farm to petitioners was contracted for in Louisiana and all premiums due were paid in Louisiana. The Policy was also issued in Louisiana by the Midsouth Regional Office of State Farm in Monroe, Louisiana.

The mutual terms and conditions of the policy describe the structure of the business entity known as a mutual benefit membership organization - a partnership of insureds.

Petitioners as members of the mutual and insureds of State Farm, were involved in an automobile accident in the City of New Orleans with a Michael Donato, a Louisiana domiciliary, who was insured by Automotive Casualty, a Louisiana insurance company, and domiciliary.

The magnitude of the injuries sustained by Malvina Gallodoro exceeded the primary coverage of the Donato policy which was $10,000.00. Donato and his insurer settled with the petitioners for policy limits without the necessity of suit making the provisions of State Farm's policy operative as to medical payments and uninsured motorists coverage.

It became necessary for petitioners to file a suit to collect medical payments and damages due under the medical pay and uninsured motorist provisions of their policy which suit they filed in the Civil District Court for the Parish of Orleans, State of Louisiana, a state forum of proper personal and subject matter jurisdiction.

State Farm removed to Federal Court alledging that it was a foreign corporation. Petitioners filed a motion to remand based on the fact that State Farm is a Louisiana limited partnership and domiciliary by virtue of having the same domicile as that of its constituent members.

The motion to remand was denied by the district judge without any evidentiary hearing on the issues of alleged incorporation and state of incorporation. Principal place of business was not pleaded nor proved.

A supervisory writ to the Fifth Circuit Court of Appeal was also denied.

The case therefore proceeded to trial in the United States District Court for the Eastern District of Louisiana and was by agreement of counsel tried before a magistrate because of the crowded docket of the district court which

had resulted in numerous continuances over the protracted course of litigation.

Petitioners attempted on the first day of trial before the Magistrate to reurge their motion to remand for lack of diversity jurisdiction which attempt was not permitted by the magistrate. This controversey between opposing Louisiana domiciliaries then proceeded to trial in a court lacking in jurisdiction in a matter not within the Constitution and Statutes of the United States.

The Judgment of the Court was favorable to petitioners on one issue in that it awarded some damages though in a much lower amount than would have been granted by a state court knowledgeable with state law and its application and was unfavorable to petitioners on all other issues which would have been decided differently by a state tribunal.

The decisions which were adverse to petitioners-inadequate damages, failure to award statutory damages, statutory penalties and attorney's fees were decided by a court lacking in jurisdiction and by a court which did not apply the applicable law of Louisiana as a Louisiana court deciding the same issues would have decided thereby causing substantial loss to petitioners.

Arbitrary and capricious conduct by an insurer who has sixty days to pay a direct line claim and who owes a duty of fair dealing to its insured subjects the insurer to substantial prenalties, additional damages and attorneys fees under Louisiana law, which law was not applied by the magistrate.

These adverse determinations are final, unless this Court grants a writ, determines lack of jurisdiction and remands the case to the state district court for the application of the Louisiana Law of contracts, compensatory damages, statutory damages, statutory penalties and attorneys fees.

REASONS WHY WRIT SHOULD BE GRANTED

A writ of certiorari should be granted to review the decision of the United States Fifth Circuit Court of Appeal for the following reasons:

1. The Fifth Circuit's affirmance of federal jurisdiction where none exists has resulted in the Fifth Circuit's sanctioning a departure from the usual course of judicial proceedings in diversity actions, permitting a federal district court to determine a controversey between citizens of the same state which is not within the authority of the Constitution or Statutes of the United States.

The Fifth Circuit has ignored the diversity statute U.S.C.A. 28:1332 and the Circuit's own jurisprudence as well as this Court's prior decisions which hold that there must be diversity, it must be complete diversity and that the domicile of an unincorporated association is that of its members. *Carden v. Arkoma Associates*, 494 U.S. 185, 110 S.Ct. 1015, 1021, 108 L.Ed. 2d 157 (1990).

The Fifth Circuit's departure and conflicts with the United States Constitution and Statutes, its own jurisprudence, the law of the circuit, and with the decisions of the Supreme Court poaches upon the territory of the

state judicial system and usurps the powers of the state tribunal. Such usurpation of the state court's jurisdiction warrants an exercise of this Court's supervisory jurisdiction to declare such actions, decisions, opinions and orders of no effect and null and void ab initio.

This departure has created intercircuit conflicts and inconsistencies in the rulings of the Fifth Circuit pertaining to diversity, the method of proof and the burden of proof and is contrary to the law of the circuit.

In the instant case the Fifth Circuit has failed to apply the law of the Circuit which it has correctly stated, and enunciated in *Gerry Oil,* 841 F.2d at 1259; *McGovern v. American Airlines, Inc.,* 511 F.2d 653, 654 (5th Cir. 1975); *Whalen v. Carter,* 954 F.2d 1087; *Newport Ltd. v. Sears Roebuck & Co.,* 941 F.2d 302, 307 (5th Cir. 1991); *Buckley v. Control Data Corp.,* 923 F.2d 96; *Stafford v. Mobil Oil Corp.,* 945 Fd. 2d 803; *Temple Drilling Company v. Louisiana Insurance Guaranty Association,* 946 F.2d 390. The law of the circuit is correctly stated, howsoever, in the Gallodoro case it is incorrectly applied.

2. This Court has not as yet addressed the issue as to whether or not U.S.C.A. 28:1332 (c) (1) defeats federal jurisdiction when the direct action is between the insured and the insured's liability carrier providing uninsured motorist coverage.

U.S.C.A. 28:1332 (c) (1) negates federal jurisdiction in a controversy between a state domiciliary liability claimant against the insurer of a domiciliary tortfeasor of the same state where the tortfeasor is not joined and should also negate jurisdiction when the insured sues directly.

ARGUMENT

There is simply no federal jurisdiction in the instant case. Neither personal jurisdiction nor subject matter jurisdiction exists in this garden variety rear end collision which occurred in New Orleans, Louisiana between Louisiana domiciliaries.

The petitioners' claims arose out of a Louisiana automobile accident and a Louisiana insurance contract and involved solely Louisiana law - contract law of uninsured motorist coverage, damages, statutory damages, satutory penalties and attorneys fees between the parties to the contract all of whom were Louisiana domiciliaries.

The ruling of the district court in accepting jurisdiction did not merit a minute entry as to the law or facts which the Court believed to support jurisdiction. The motion to remand merited only one word - "Denied". Not one finding of fact or conclusion of law was recited by the district court.

The Fifth Circuit affirmed in a per curiam finding no error of fact or law leaving petitioners to guess as to why a federal district court entertained a trial between Louisiana domiciliaries on its merits and in a way contrary to the law of Louisiana.

This case which would have been handled with dispatch in a state district court became entangled in the complexities of federal judicial procedure where it was in protracted litigation for four years.

The defendant urged federal jurisdiction claiming diversity but failed to proved incorporation, state of incorporation or principal place of business.

> *"The burden of proving that complete diversity exists rests upon the party who seeks to invoke the court's diversity jurisdiction." Gerry Oil, 841 F.2d at 1259; see McGovern v. American Airlines, Inc., 511 F.2d 653, 654 (5th Cir.1975.*

There was no evidentiary hearing held by the court to determine questions of fact despite the law of the circuit. In *Stafford v. Mobil Oil Corp.*, 945 Fd.2d 803 the Fifth Circuit vacated the district court's acceptance of jurisdiction where the record did not disclose jurisdiction.

> "Where a federal court proceeds in a matter without first establishing that the dispute is within the Constitution and statutes, the federal tribunal poaches upon the territory of a coordinate judicial system and its decisions, opinions, and orders are of no effect." *B. Inc. v. Miller Brewing Co.*, 663 F.2d 545, 548 (5th Cir. 1981); *Stafford v. Mobil Oil Corp.*, 945 Fd.2d 803.

The defendant produced one document, its Articles of Association filed with the insurance commissioner of the State of Illinois in 1922. The Articles of Association used the term association and corporation interchangeably. The use of the word corporation in the Articles of Association did not connote a legal corporation or a jural person, but was used as a reference to the business entity as a body of insureds. It was used in the Articles in its

American dictionary connotation and not in the legal context of a corporation.

An examination of the policy of insurance leaves no doubt that State Farm is a mutual association composed of members who are both the policyholders and owners of the mutual. The mutual conditions of the State Farm policy states:

> *1. **Membership Fees considered as additional premium for the first six months.** The membership fees provided in this policy are additional premiums for the first six months of insurance with the company, and thereafter are not returnable, and entitle the first insured named in the declarations to insure one vehicle for any applicable coverage, and to insurance for any other coverage for which said fees were paid so long as:*
>
> *a. this company continues to write such coverages;*
> *b. the vehicle to be insured meets the eligibility requirements of the company; and*
> *c. the insured remains a risk desirable to the company.*
>
> *While this policy is in force, the first insured named in the declarations is entitled to vote at all meetings of members and to receive dividends the Board of Directors in its discretion may declare in accordance with reasonable classifications and groupings of policyholders established by such Board.*

*3. **Annual Meeting.** The annual meeting of the **members** of the company shall be held at its **home office** at Bloomington, Illinois, on the second Monday of June at the hour of 10:00 A.M., unless the Board of Directors shall elect to change the time and place of such meeting, in which case, but not otherwise, due notice shall be mailed each member at the address disclosed in this policy at least 10 days prior thereto.*

That the State Farm policy is a Louisiana policy to be governed by Louisiana law is also a declaration in the policy.

6. Terms to Conform to Statute.
If any terms of this policy are in conflict with the statutes of Louisiana, they are amended to conform to those statutes.

U.S.C.A. 28:1332 (A) confers federal jurisdiction only when opposing parties are citizens of different states.

For a business entity to avail itself of federal diversity jurisdiction, it must be incorporated. It must be a jural person and it must be domiciled in a state other than that of the opposing party and have its principal place of business in a state other than at the domicile of the opposing party.

In *Whalen v. Carter* 954 F.2d 1087, the Fifth Circuit examined jurisdiction and the domicile of an unincorporated association, a partnership, and stated,

"The diversity statute requires "complete diver-

sity" of citizenship: a district court cannot exercise diversity jurisdiction if one of the plaintiffs shares the same state citizenship of one of the defendants. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806); Mas v. Perry, 489 F.2d 1396, 1398-99 (5th Cir. 1974), cert. denied, 419 U.S. 842, 95 S.Ct. 74, 42 L.Ed 2d 70 (1975).

State Farm as its name and the mutual conditions of the policy attest is a mutual company not a corporation.

...it is well established that a mutual insurance company is a cooperative enterprise in which the members are both insurers and insured; the Company is owned and managed by the policyholders; the business is conducted for their benefit; they are the owners of the profits and the surplus and thus a policyholdeer has rights, both as an insured and as a co-owner of the assets of the company. See 44 C.J.S. Insurance §104, page 644; Appleman's Insurance Law and Practice, Chapter 344, Section 10047, page 100; May on "Insurance", Vol. 2 page 1290. In Cooley's Briefs on the Law of Insurance, Vol. 1, (2d) Ed. page 68, it is stated:

"The members and stockholders of a mutual insurance company are, therefore, identically the same. That is to say, a stockholder of a mutual insurance company by way of premiums and who is responsible for its losses to that extent and who is entitled, when such premiums shall have been accumulated to a larger sum than is required to

pay the losses to pro rata division thereof as profits." Public Housing Administration v. Housing Authority of Bogalusa, 127 S.2d 315.

A corporation derives existence through being granted a charter by the state following compliance with certain forms "incorporator" or "incorporators". ... a corporation does not consist of persons but is a fictional person itself which functions through agents deriving their appointment as an ultimate matter from the shareholders. ... no contractual relationship exists between shareholders. In a partnership the relationship (1) is founded on the intent of the members to be partners, that is their consent thereto L.S.A. C.C. Art. 2805 No. 2 is founded on a contract between two or more persons for the pooling of property, credit, skill or industry for the mutual participation in the profits which may accrue therefrom L.S.A. C.C. Art. 1801 and is founded on the obligation of each partner to contribute in some way to the partnership enterprise. L.S.A. C.C. Art. 2801 and 1809. Martinez v. Posner, Martinez, and Padgett, 385 So.2d 525.

The mutual conditions of the State Farm policy describe the insurance entity as a Louisiana partnership and not a corporation. The policy by its terms must be intrepreted by Louisiana law.

An unincorporated association is not a "jural" person for diversity persons. *Vieer v. Horney Ester Construction.*, 69 F.R.D. 370.

When an unincorporated association sues or is sued in federal court, its citizenship for diversity purposes is deemed to be that of each of its members. *Kaplan v. Industrial Risk Insurers 86 F.R.D. 484.*

In *Carden v. Arkoma Associates,* 494 U.S. 284, 110 S.Ct. 1015, 1021, 108 L.Ed. 2d 157 (1990) this court held that the citizenship of an artificial entity for purposes of diversity is the citizenship of each of its entity's constituent members.

> "... [t]he tradition of the common law is to treat as legal persons only incorporated groups and to assimilate all others to partnership. 110 S.Ct. at 1018 (quoting *Russell,* 288 U.S. at 480, 53 S. Ct. at 440)."

Other panels of the Fifth Circuit have consistently followed the *Carden* rule in other cases involving lack of jurisdiction over unincorporated associations whose domicile is that of its members.

Fifth Circuit decisions many of which have been recently decided correctly state the law in reversing the district courts acceptance of jurisdiction and remanding cases in which federal jurisdiction was lacking. *Stafford v. Mobil Oil Corp.,* 945 Fd. 2d 803; *Newport Ltd. v. Sears, Roebuck & Co.,* 941 F.2d 302, 307 (5th Cir. 1991); *Temple Drilling Company v. Louisiana Insurance Guaranty Association,* 946 Fd.2d 390; and *Whalen v. Carter,* 854 F.2d 1087.

The law of the circuit succinctly stated is that there

must be complete diversity of citizenship before diversity jurisidiction can be invoked and granted. (*Whalen v. Carter,* 854 F.2d 1087; *Buckley v. Control Data Corp.,* 923 F.2d 96).

There is no diversity of citizenship where limited partners bring action against the limited partnership as an entity. *Buckley* (supra); *Newport* (supra). The citizenship of a mutual is that of its members, *Temple* (supra) and there must be an evidentiary hearing and jurisdictional findings, *Stafford* (supra).

The district court made no jurisdictional findings contrary to the dictates of *Stafford* (supra) and was affirmed. The district court disregarded the law of the circuit as ennunciated in *Whalen,* (supra); *Newport,* (supra); *Stafford* (supra) and *Temple,* (supra) and yet was affirmed by the Fifth Circuit who also disregarded Circuit law and Supreme Court decisions.

Neither the district court nor the Fifth Circuit applied its law or the law of this court.

In 1964 U.S.C.A. 28:1332 (C) (1) was amended by Congress to specifically address the issue of the proliferation of federal litigation involving state automobile accident cases. These cases were and to some extend are still clogging the docket of the federal courts.

Many diversity cases were eliminated by making incorporated and unincorporated insurance entities domiciliaries of their respective insured's state.

In 1988 congress again amended U.S.C.A. 28:1332 to raise Jurisdictional amount from $10,000 to $50,000 specifically to address the issue of federal jurisdiction in state automobile accident cases.

The provisions of the law (U.S.C.A. 28:1332 (C) (1) should also be interpreted to make the insurer a domiciliary of the insured's state of residence when the action is between the insured and the insurer, and not a third party claiming damages because of liability.

The aforestated issue has not been addressed by this Court but should be. There is no legal basis or rationale for concluding that U.S.C.A. 28:1332 (C) (1) does not apply to uninsured motorist claims between the state domiciliary insured and its insurer.

It seems somewhat irrational and illogical to make the insurer a domiciliary of the defendant tortfeasor's state thereby precluding federal jurisdiction when a state domiciliary sues the insurer of another state domiciliary and granting federal jurisdiction when the state domiciliary must sue his own insurer with whom he contracted in his domiciliary state in a matter involving a contract entered into and governed by state law.

In 1991 then Chief Judge Clark declared a state of emergency in the Fifth Circuit because of the proliferation of litigation and shortage of judges.

The recent aforestated Fifth Circuit cases on jurisdiction were lacking jurisdiction, yet all had proceeded through the system through the Fifth Circuit and

demonstrate that the proliferation of cases lacking in jurisdiction has resulted from failure to make jurisdictional findings of fact at the entry level to the federal system.

Costly and protracted litigation which could have been avoided at the entry level by documentary proof by way of certified copies of corporate charters and other documents evidencing principal place of business should be made a pre-requisite to removal and an evidentary hearing on the issue of jurisdiction conducted prior to any status conferences, pretrial conferences, discovery and protracted and expensive trials and appeal.

CONCLUSION

A writ should be granted and all orders and judgments entered by the district court and affirmed by the Fifth Circuit declared null and void ab initio because of the absence of diversity jurisdiction as this matter was not within the Statutes and Constitution of the United States. The case should be remanded to state court for a determination of petitioner's rights and remedies by a court of competent jurisdiction.

Respectfully submitted,

LAW OFFICES OF
EVANGELINE M. VAVRICK
912 Louisiana Avenue
New Orleans, Louisiana 70115
(504) 899-5555

By:
Evangeline M. Vavrick

PROOF OF SERVICE

I, Evangeline M. Vavrick, attorney for the petitioners and a member of the bar of the Supreme Court of the United States, hereby certify that on this day, I have served copies of the foregoing application for writs on:

Matthew J. Ungarino
Law Offices of Matthew J. Ungarino
1470 One Lakeway Center
3900 North Causeway Boulevard
Metairie, Louisiana 70001
Attorney for Respondent

By mailing a copy thereof, postage prepaid addressed to his office, this 4th day of March, 1994.

_____

EVANGELINE M. VAVRICK

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3898

FILED
DEC 07 1993

STEPHEN GALLODORO, and
MELVINA GALLODORO,

Plaintiffs-Appellants,

versus

STATE FARM INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

(90-CV-5025 M 4)

Before POLITZ, Chief Judge, GARWOOD and DUHE, Circuit Judges.

PER CURIAM:*

This matter is before the court on appeal of the decision of the magistrate judge after a bench trial. Having considered the briefs, oral arguments of counsel, and pertinent parts of the record, and finding neither clearly erroneous finding of fact nor error of law or abuse of discretion, the judgment appealed is AFFIRMED.

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

APPENDIX B

U.S. District Court
USDC for the Eastern District of Louisiana (New Orleans)

CIVIL DOCKET FOR THE CASE #: 90-CV-5025

Gallodoro, et al v.
State Farm Ins. Co.
Assigned to: Judge Peter Beer
Demand: $50,000
Lead Docket: none
Dkt# in CDC Orleans is 90-23014

Filed: 12/26/90
Nature of Suit: 110
Jurisdiction: Diversity
Division E

Cause: 28:1446 Petition for Removal

STEPHEN GALLODORO plaintiff	Evangeline M. Vavrick (504) 899-5555 [COR LD NTC] Attorney at Law 912 Louisiana Ave. New Orleans, LA 70115 (504) 899-5555
MALVINA GALLODORO Plaintiff	Evangeline M. Vavrick (See above) [COR LD NTC]

v.

DATE OF ENTRY NOV 07 1991

STATE FARM INSURANCE COMPANY defendant	Matthew J. Ungarino [COR LD NTC] Attorney at Law 3900 N. Causeway Blvd. Suite 1300 Metairie, La 70002 (504) 832-0999
	Patrick Joseph Sanders [COR] Attorney at Law 3900 Causeway Blvd.
COURT REPORTER: RHONDA BALLARD	Suite 1300 Metairie, LA 70002 (504) 832-0999

90-5025 M WEDNESDAY, NOVEMBER 6, 1991 9:30
Pltfs Mtn to Remand To CDC, Orleans Parish.(56)

Oral argument: Motion DENIED.

NO. 93-1393

Supreme Court, U.S.
FILED
APR 7 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

STEPHEN AND MALVINA GALLODORO
Petitioners

vs.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MATTHEW J. UNGARINO #15061
UNGARINO & BORDELON
1470 ONE LAKEWAY CENTER
3900 NORTH CAUSEWAY BLVD.
METAIRIE, LA 70002
Telephone: (504) 835-0077

Attorney for Respondent
State Farm Mutual Automobile
Insurance Company

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

37 pp

QUESTIONS PRESENTED FOR REVIEW

1.

Do plaintiffs have standing to challenge the decisions of the trial court and Fifth Circuit Court of Appeal where plaintiff has accepted full payment of all claims asserted, has cashed a draft forwarded in full satisfaction of all claims asserted, and where plaintiff is now barred by the doctrine of accord and satisfaction?

2.

Where an evidentiary hearing is held, and defendant produces prima facia evidence that it is an Illinois corporation, with a principal place of business in Illinois, and plaintiffs are Louisiana domicilaries, did the district court err in denying plaintiff's motion to remand?

3.

Is the well settled rule that actions under the uninsured motorist provisions of an auto liability policy do not fall within the proviso of 28 U.S.C. Section 1332(C)(1), erroneous?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	2
CONCLUSION	7
PROOF OF SERVICE	9
APPENDIX A	A-1 - A-8
APPENDIX B	B-1 - B-15

TABLE OF AUTHORITIES

CASES **Page**

Adams v. State Farm Mutual Automobile Ins. Co., 313 Fed. Supp. 1349 (N.D. Miss. 1970) 6,7

Allstate Insurance Company v. State, 427 So.2d 1197 (La.App. 1 Cir. 1982) 3

American Bank & Trust Co. v. Hannie, 568 So.2d 216, (La.App. 3 Cir. 1990), *writ denied*, 572 So.2d 64 (La. 1990) 3

Barnett v. Norfolk & Devham Mutual Fire Ins. Co., 1991 WL 193124 (N.D. Ga.) 6

Brocki v. American Express Co., 279 F.2d 785, 786 (6 Cir.), *cert. denied*, 364 U.S. 871 (1960) 4

Cote v. Wadel, 796 F.2d 981, 983 (7 Cir. 1986) 6

Ferrerra v. Aetna Casualty & Surety Co., 436 Fed. Supp. 929 (WD Ark. 1977) 7

First Municipal Leasing Corp. v. State, 422 So.2d 1182, *writ denied*, 427 So.2d 867, 427 So.2d 1197 3

Fritz v. American Home Shield Corp., 751 F.2d 1152 (1985) 5

Harrington v. Aetna Life and Casualty Co., 441 So.2d 1255, (La. App. 1 Cir. 1983) 3

TABLE OF AUTHORITIES (continued)

CASES **Page**

Irvin v. Allstate Ins. Co., 436 Fed. Supp. 575 (WD Okla. 1977) 7

McClelland v. Security Industrial Insurance Co., 426 So.2d 665, *writ denied*, 430 So.2d 94 (La. App. 1 Cir. 1982) 3

Mutual Serv. Cas. Ins. Co. v. Country Life Ins. Co., 859 F.2d 548, 551 (7 Cir. 1988) 6

Mutual Service Casualty Ins. Co. v. Country Life Ins., 859 F.2d 548, 550 (7th Cir. 1988) 4

Reily Electrical Supply, Inc. v. Hollenberg, 535 So.2d 1321 (La. App. 5 Cir. 1988) *writ denied*, 540 So.2d 331 (La. 1988) 4

Saxe, Bacon & Bolan, P.C. v. Martindale-Hubbell, 710 F.2d 87, 89 (2nd Cir. 1983) 4

Spalitta v. Hartford Fire Ins. Co., 428 So.2d 824 (La. App. 5 Cir. 1983) 3

State Farm Fire & Casualty Company v. Byrd, 710 F.2d 1292 (N.D. Cal. 1989) 6

Tuck v. USAA, 859 F.2d 842 (10 Cir. 1988), *cert denied*, 109 S.Ct. 1534, 103 L.Ed. 839 (1989) 6

Statute

28 U.S.C. 1332(C)(1) 1,2,4,6,7

STATEMENT OF THE CASE

Petitioners have no standing to bring this matter before this court. After the decision of the United States Fifth Circuit Court of Appeal, defendant forwarded plaintiffs, on January 6, 1994, a general release of claims and certificate of docket satisfaction. Respondent forwarded petitioners a draft in the amount of $70,874. See, Appendix, pages A-1 through A-3.

The draft was endorsed by petitioners and their attorney and cashed January 10, 1994. See, Appendix, page A-7, A-8.

The draft was clearly presented for extinguishment of all claims. The draft was cashed, by plaintiffs and their attorney, effectively extinguishing all matters raised in the petition for certiorari. This court has no jurisdiction of this matter, as an accord and satisfaction has been effected.

Respondent proved to the satisfaction of the trial court and Fifth Circuit Court of Appeal, that it is an Illinois corporation, with a principal place of business in Illinois. Defendant was incorporated in 1922. An evidentiary hearing was held by the trial court, which correctly denied plaintiff's motion to remand. The trial court properly upheld federal diversity jurisdiction, and properly applied Louisiana law in granting judgment in favor of plaintiffs at trial. Plaintiff has no injury that would justify review by this court.

Plaintiffs are in error by asserting that 28 U.S.C. Section 1332(C)(1) applies to actions under the uninsured

motorist provisions of an automobile liability policy. Such actions are not encompassed within the statute.

SUMMARY OF THE ARGUMENT

Petitioners have no right to bring this application. Respondent forwarded a draft in full payment of all claims on January 6, 1994. The draft was presented for payment on January 10, 1994. The petitioners' claims are extinguished by the doctrine of accord and satisfaction.

The trial court properly denied petitioners' motion to remand. Respondent produced adequate proof that it is an Illinois corporation with a principal place of business in Illinois. Petitioners are Louisiana citizens. Diversity jurisdiction was properly maintained.

28 U.S.C. 1332 (C)(1) does not apply to claims under the uninsured motorist provision of an automobile liability policy. Petitioners are attempting to invoke this provision. It is inapplicable.

There exists no reason for this court to exercise jurisdiction over this matter.

ARGUMENT

THE DOCTRINE OF ACCORD AND SATISFACTION BARS THIS PETITION.

After the Fifth Circuit Court of Appeal rendered its decision on December 7, 1993, correctly affirming the judgment of the trial court, counsel for defendant forwarded a

draft in full payment of the judgment below on January 6, 1994 with a General Release of Claims and Certificate of Docket Satisfaction. The draft was in the amount of $70,874.00, full payment of the judgment.

The draft was forwarded with documents clearly evidencing an intent by defendant that payment was forwarded in full settlement of this action. See, Appendix, P. A-1, undersigned counsel's letter of January 6, 1994.

The draft was endorsed by plaintiffs and their attorney and cashed January 10, 1994. (See Appendix, p. A-4, A-5.)

Under the doctrine of accord and satisfaction, petitioners' claims have been resolved. The elements of an accord and satisfaction, include an unliquidated or disputed claim, a tender by the debtor, and an acceptance by the creditor. *McClelland v. Security Industrial Insurance Co.*, 426 So.2d 665, *writ denied*, 430 So.2d 94 (La. App. 1 Cir. 1982); *First Municipal Leasing Corp. v. State*, 422 So.2d 1182, *writ denied*, 427 So.2d 867, 427 So.2d 1197, and *Allstate Insurance Company v. State*, 427 So.2d 1197 (La. App. 1 Cir. 1982).

For there to be an accord and satisfaction the creditor must be fully aware that the tender is offered as final settlement in the matter. *Spalitta v. Hartford Fire Ins. Co.*, 428 So.2d 824 (La. App. 5 Cir. 1983); *Harrington v. Aetna Life Casualty Co.*, 441 So.2d 1255, (La. App. 1 Cir. 1983); *American Bank & Trust Co. v. Hannie*, 568 So.2d 216, (La. App. 3 Cir. 1990), *writ denied*, 572 So.2d 64 (La.

1990); *Reily Electrical Supply, Inc. v. Hollenberg*, 535 So.2d 1321 (La. App. 5 Cir. 1988), *writ denied*, 540 So.2d 331 (La. 1988).

In this case, it is obvious that there has been an accord and satisfaction. The letter of January 6, 1994 (Appendix p. A-1) was forwarded to the petitioners along with the Receipt & Release and Certificate of Docket Satisfaction in complete settlement of this claim. It was forwarded to petitioners through their attorney, who presumably can be held to the standard of knowing that negotiating the draft would operate to release all claims in this matter.

All three elements of accord and satisfaction have been met. Petitioners have no remaining claim that is ripe for adjudication before this court.

DIVERSITY JURISDICTION WAS PROPERLY INVOKED.

Citizenship of the defendant in the instant case turns on whether or not defendant is incorporated. If so, defendant is deemed a citizen of the state in which it is incorporated. 28 U.S.C. 1332(C)(1).

Whether an entity is a corporation for diversity purposes must be determined by state law. *Mutual Service Casualty Ins. Co. v. Country Life Ins.*, 859 F.2d 548, 550 (7th Cir. 1988); *Saxe, Bacon & Bolan, P.C. v. Martindale-Hubbell*, 710 F.2d 87, 89 (2nd Cir. 1983) *Brocki v. American Express Co.*, 279 F.2d 785, 786 (6 Cir.), *cert. denied*, 364 U.S. 871 (1960). When the appropriate regulatory agency has recognized that the entity has been properly incor-

porated pursuant to that state's law, no further inquiry is appropriate, *Fritz v. American Home Shield Corp.*, 751 F.2d 1152 (1985).

State Farm Mutual Automobile Insurance Company was incorporated under the laws of the State of Illinois on March 29, 1922. This can be evidenced by referring to records from the Department of Trade and Commerce. Petitioners argue that because defendant filed Articles of Association as opposed to Articles of Incorporation, it is in fact not incorporated. Petitioners' argument is in error. The proper method for an insurance company to become incorporated in the State of Illinois, Louisiana and in most other states is to file Articles of Association with the Commissioner of Insurance. State law dictates that no insurance company may file with the Secretary of State in its attempt to become incorporated.

Defendant's Articles of Association Appendix B, p. B-1 - B-3) consistently and repetitively refers to defendant as a corporation. "Association" is only used in reference to the "Articles" filed by State Farm Mutual Automobile Insurance Company. Otherwise, the Articles set out all the requisites of a corporation, including a proper name (an incorporated entity must end with either Corp., Inc., Co., or Ltd.); the principal or home office; its duration, its purpose; and a Board of Directors organized in accordance with Corporations law.

Thus, State Farm Mutual Automobile Insurance Company is properly incorporated under the law of the State of Illinois. Case law is clear in finding that mutual insurance companies that are incorporated under state law

are treated as corporations under 28 U.S.C. 1332 (C)(1); *Mutual Serv. Cas. Ins. Co. v. Country Life Ins. Co.*, 859 F.2d 548, 551 (7 Cir. 1988); *Barnett v. Norfolk & Devham Mutual Fire Ins. Co.* 1991 WL 193124 (N.D. Ga.). Additionally *Barnett* cites *Cote v. Wadel*, 796 F.2d 981, 983 (7th Cir. 1986) which states that "incorporated reciprocal insurance associations are treated as if they were incorporated because associations were subject to the same regulation as INCORPORATED INSURANCE COMPANIES".

In *State Farm Fire & Casualty Company v. Byrd*, 710 Fed. Supp. 1292 (N.D. Cal. 1989), the identical argument was made and rejected.

A corporation is a citizen of the state in which it is incorporated and has its principal place of business. State Farm is incorporated in, and has its principal place of business in, Illinois. See Appendix, B-1.

There is no contradictory evidence presented by plaintiffs. There is no injury here. There is no injury which would rise to a constitutional level. There is no conflict among the U. S. appellate courts. There is no inter-circuit conflict within the Fifth Circuit Court of Appeal.

28 U.S.C. 1332(C)(1) IS INAPPLICABLE.

It is a well settled rule that an action against the uninsured motorist provisions of an automobile liability policy is not a "direct action" within the proviso of 28 U.S.C. Section 1332(C)(1). Petitioners' argument is completely wrong. *Tuck v. USAA*, 859 F.2d 842 (10 Cir. 1988), *cert denied*, 109 S.Ct. 1534, 103 L.Ed. 839 (1989); *Adams v.*

State Farm Mutual Automobile Ins. Co., 313 Fed. Supp. 1349 (N.D. Miss. 1970); *Irvin v. Allstate Ins. Co.*, 436 Fed. Supp. 575 (WD Okla. 1977); *Ferrerra v. Aetna Casualty & Surety Co.*, 436 Fed. Supp. 929 (WD Ark. 1977).

CONCLUSION

Petitioners have no standing to bring this petition of certiorari. Respondent objects to the court's jurisdiction over this matter. Petitioners have accepted payment of the claims. Petitioners' claims are barred by the doctrine of accord and satisfaction.

The attempts to remand this case were fully and fairly heard at the trial court level, and properly denied. State Farm is an Illinois corporation with its principal place of business in Illinois. Petitioners are residents of the State of Louisiana. Diversity jurisdiction was properly invoked, pled, and proven. Petitioners' argument that 28 U.S.C. 1332(C)(1) applies to an action under the uninsured motorist provision of an auto liability policy is clearly erroneous.

Petitioners have sustained no injury. Petitioners merely tried their case in federal court rather than state court. The federal court properly applied Louisiana law. Petitioners obtained a judgment, which has been paid and accepted. No injury of constitutional proportions is presented. There is no conflict among the federal appellate circuts, nor even within the Fifth Circuit Court of Appeal.

This court should deny the petition for writ of certiorari. Respondent is entitled to, and prays for, its costs for filing this brief in response.

Respectfully submitted,

MATTHEW J. UNGARINO #15061
DAVID I. BORDELON #16815
1470 ONE LAKEWAY CENTER
3900 NORTH CAUSEWAY BLVD.
METAIRIE, LA 70002
(504) 835-0077

PROOF OF SERVICE

I, Matthew J. Ungarino, attorney for respondent, State Farm Mutual Automobile Insurance Company, hereby certify that on this day, I have served copies of the foregoing Opposition to Writ of Certiorari on:

Evangeline M. Vavrick
LAW OFFICE OF
EVANGELINE M. VAVRICK
912 Louisiana Avenue
New Orleans, Louisiana 70115
(504) 899-5555

By mailing a copy thereof, postage prepaid addressed to her office, this 5th day of April, 1994.

MATTHEW J. UNGARINO

APPENDIX A

ATTORNEYS AT LAW
1470 LAKEWAY ONE
3900 N. CAUSEWAY BOULEVARD
METAIRIE, LOUISIANA 70002

MATTHEW J. UNGARINO
DAVID I. BORDELON
PATRICK J. SANDERS
JULIE A. KNUTEL

(504) 835-0077
FAX: (504) 835-0398

JANUARY 6, 1994

Evangeline M. Vavrick, Esq.
912 Louisiana Avenue
New Orleans, Louisiana 70115

RE: Stephen Gallodoro
Claim No: 18-5421-521
File No: 1-2272

Dear Evangeline:

Enclosed are the following closing documents and draft in full and final satisfaction of your client's claim in the above referenced action:

1. The original and two copies of a General Release, Release of all Claims and Indemnity Agreement. Please have the original and one copy executed and return them to me.

2. The original and one copy of the Certificate of Docket Satisfaction. Please execute the original and return it with the Receipt and Release.

3. State Farm Mutual Automobile Insurance Company's draft in the amount of $70,874.00 payable to Stephen Gallodoro and Malvina Gallodoro and their attorney, Evangeline M. Vavrick.

This is forwarded with the understanding that you will protect our interests by executing and returning the enclosed documents prior to negotiation of this draft.

Thank you for your co-operation in this regard.

Yours very truly,

/s/ Matthew J. Ungarino
Matthew J. Ungarino

GENERAL RELEASE, RELEASE OF ALL CLAIMS AND INDEMNITY AGREEMENT

KNOW ALL MEN BY THESE PRESENTS:

THAT we, Stephen Gallodoro and Malvina Gallodoro, for the sole consideration of the sum of SEVENTY THOUSAND EIGHT HUNDRED SEVENTY-FOUR AND NO/100 (70,874.00) DOLLARS, in hand paid, the receipt whereof is hereby acknowledged, do hereby release and forever discharge State Farm Mutual Automobile Insurance Company of and from any and all claims or demands of whatsoever kind or nature, for or because of any matter or thing done, omitted or suffered to be done by State Farm Mutual Automobile Insurance Company prior to and including the date hereof, and particularly on account of any and all claims which we have or may have for injuries, damage, loss or expenses, regardless of the kind or nature, as a result of the accident which occurred on or about January 24, 1990 at or near the intersection of Dauphine Street and Elysian Fields Avenue, New Orleans, Louisiana.

WE DO FURTHER HEREBY agree to indemnify and hold harmless the said State Farm Mutual Automobile Insurance Company of and from any and all further claims that may be made or asserted by US or anyone because of the injuries, damage, loss or expenses suffered in the aforesaid accident, whether such claim is made by way of indemnity, contribution, subrogation or otherwise.

IT IS FURTHER understood and agreed that the parties herein released have not admitted any liability

whatsoever and it is recognized and understood that they do specifically deny any and all responsibility in connection with the claims and suit described herein.

THE AFORESAID payment is also reveived in full compromise and settlement of the matter entitled: "Stephen Galladoro and Malvina Gallodoro v. State Farm Insurance Company" bearing No. 90-5025, Section M of the United States District Court for the Eastern District of Louisiana, and we hereby instruct our counsel of record to file an appropriate motion dismissing said suit, with prejudice, each party to bear his own costs of court.

THE FOREGOING payment is also received in full compromise and settlement of any and all claims that we have or may have against the said State Farm Mutual Automobile Insurance Company under the policy of insurance issued to Stephen Gallordore whether under the liability, medical payment, or any other feature of said policy as a result of the aforesaid incident.

IN WITNESS WHEREOF, we have hereunto set our hand, this ____ day of ____, 1994.

WITNESSES:

_____ _____

STEPHEN GALLODORO

_____ _____

MALVINA GALLOLLDQRO

This Release of all Claims has been read and approved as to form and content.

_____

Attorney for Releasor

STATE OF LOUISIANA

PARISH OF

A C K N O W L E D G M E N T

ON THIS ____ day of ____, 1994, before me personally appeared: **STEPHEN GALLODORO AND MALVINA GALLODORO,** to me known to be the persons described in and who executed the foregoing instrument and acknowledged that said instrument was executed freely and for the purposes therein set forth.

_____

NOTARY PUBLIC

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

STEPHEN GALLODORO AND MALVINA GALLODORO	*	**CIVIL ACTION**
VERSUS	*	**NO: 90-5025**
STATE FARM INSURANCE COMPANY	*	**SEC, M Mag. 4**

FILED: _____ _____

DEPUTY CLERK

CERTIFICATE OF DOCKET SATISFACTION

NOW INTO COURT, Through undersigned counsel, come Stephen Gallodoro and Malvina Gallodoro, plaintiffs herein, who acknowledge receipt of full payment in satisfaction of judgment rendered against State Farm Mutual Automobile Insurance Company, defendant herein, and do hereby authorize, instruct and direct the Clerk of Court to mark the docket "Judgment Paid - Docket Satisfied" and authorize their attorney to act on their behalf.

_____

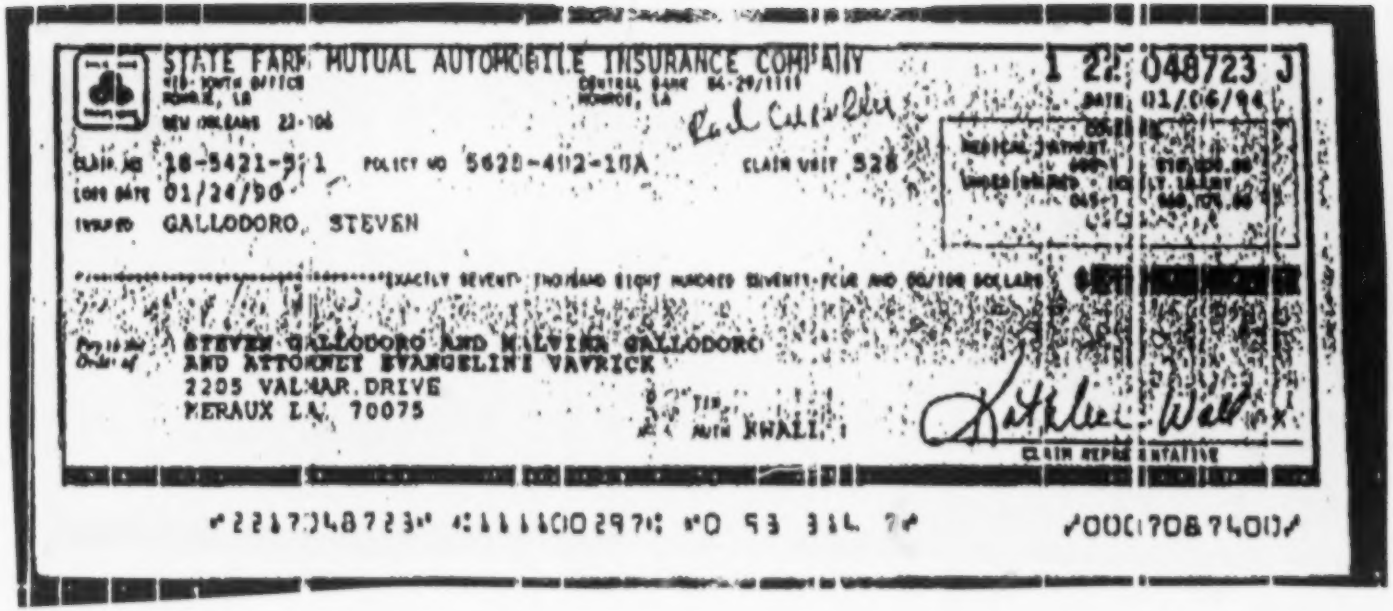
EVANGELINE M. VAVRICK

This ____ day of ____, 1994.

_____

CLERK, UNITED STATES DISTRICT COURT

BEST AVAILABLE COPY



STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

1 22 048723 J

DATE 01/06/94

CLAIM NO 18-5421-91 1 POLICY NO 5628-4112-10A CLAIM UNIT 528

LOSS DATE 01/24/90

INSURED GALLODORO, STEVEN

MEDICAL PAYMENT $10,000.00

UNDERINSURED $ 40,000.00

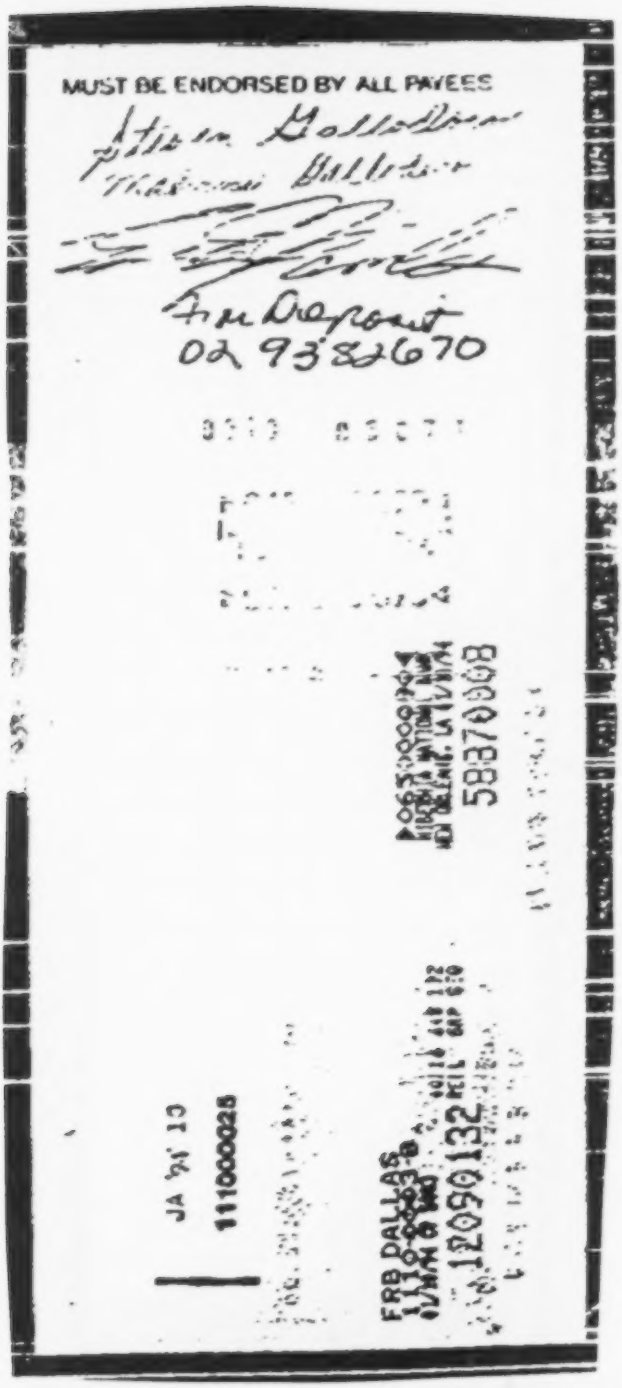
EXACTLY SEVEN THOUSAND EIGHT HUNDRED SEVENTY-FOUR AND 00/100 DOLLARS $7874.00

PAY TO THE ORDER OF STEVEN GALLODORO AND KALVINA GALLODORO AND ATTORNEY EVANGELINE VAVRICK
2205 VALMAR DRIVE
MERAUX LA. 70075

TIN
AUTH SMALL

CLAIM REPRESENTATIVE

⑈048723⑈ ⑆111600297⑆ 0 53 31L 7⑈ ⑈0007087401⑈



BEST AVAILABLE COPY

APPENDIX B

RESTATED ARTICLES OF ASSOCIATION OF STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

ARTICLE I. The name of the corporation shall be STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY.

ARTICLE II. The principal or home office of the corporation shall be located in the City of Bloomington, County of McLean and State of Illinois.

ARTICLE III. The period of duration of the corporation shall be perpetual.

ARTICLE IV. The classes of insurance business in which the corporation proposes to engage and the kinds of insurance in each class it proposes to write (including cession of and acceptance of reinsurance of all or any part of any risk) are as set forth and defined in

Class 2 (a) accident and health; (b) vehicle; (c) liability; (d) workmen's compensation; (e) burglary and forgery; (f) glass; (g) fidelity and surety; (h) miscellaneous; (i) other casualty risks; and (j) contingent losses, and

Class 3 (a) fire; (b) elements; (c) war, riot and explosion; (d) marine and transportation; (e) vehicle;

(f) property damage, sprinkler leakage and crop; (g) other fire and marine risks; and (h) contingent losses,

of Section 4 of the Illinois Insurance Code, or as said section may be hereafter amended, said code being an Act entitled, "An Act to revise the law relating to insurance and to repeal certain Acts therein named," (Approved June 29, 1937. Effective July 1, 1937) as amended.

ARTICLE V. (a) The corporate powers shall be exercised by a Board of Directors, the number of whom, which shall be not less than eleven (11) nor more than fifteen (15), shall be provided in the By-Laws. All Directors shall be natural persons who are members of the corporation and who are at least twenty-one years of age. At least three Directors shall be residents and citizens of Illinois. The Board of Directors shall be divided into three classes as nearly equal as possible, as fixed by the by-laws, and the term of office of each class shall be for three years. Directors shall hold office until their successors are elected and qualified. All Directors shall be elected by the members at their annual meeting. The members may vote in person or by proxy at all meetings of members as provided by the by-laws. Vacancies in the Board of Directors may be filled by the remaining Directors until the next annual meeting of members when the vacancies shall be filled by the members for the remainder of the term.

(b) The Board of Directors shall have power, consistent with law and these Articles of Association, to make, alter, amend and repeal By-Laws and rules and regulations

and to take all other action necessary or desirable for the government of the Directors, officers, members, agents and employees of the corporation and for the conduct of its business and affairs.

(c) The corporation is organized upon the mutual plan and shall be subject to those laws applicable to mutual insurance corporations transacting the classes and kinds of insurance set forth in these Articles of Association and engaged in by the corporation.

* * * * * * *

I, Laura P. Sullivan, Secretary of State Farm Mutual Automobile Insurance Company, do hereby certify that Association of State Farm Mutual Automobile Insurance Company as amended, subject to and effective upon the approval of the Director of the State of Illinois Department of Insurance, by a resolution duly adopted by the Board of Directors at its regular meeting held at the home office of the Company on March 13, 1988.

In witness whereof I have hereunto set my hand and caused the seal of State Farm Mutual Automobile Insurance Company to be hereunto affixed this 19th day of April, 1988.

(SEAL)

/s/ Laura P. Sullivan

Laura P. Sullivan, Secretary

* * * * * * *

Approved and filed this 28 day of April, 1988,. A.D. 1988.

/s/ John E. Washburn

Director of Insurance
John E. Washburn

B-5

AFFIDAVIT

The undersigned hereby attests that the attached Company's Certificate of Authority issued to State Farm Mutual Automobile Insurance Company by the State of Louisiana is a true copy of said document.

/s/ John P. Gartin

John P. Gartin
Counsel
State Farm Mutual Automobile
Insurance Company

State of Illinois:

County of McLean:

Signed before me on August 15, 1991 by John P. Gartin.

(seal)

"OFFICIAL SEAL"
Beverly LaDuke
Notary Public
State of Illinois
My Commission Expires
2/8/94

/s/ Beverly LaDuke

Notary Public

DON FRISBY

AUG 20 1991

RESIDENT CLM. SUPT.

STATE OF LOUISIANA

(SEAL)
DUDLEY A. GUGLIELMO
COMMISSIONER
COMMISSIONER OF INSURANCE
BATON ROUGE

AMENDED

Company's Certificate of Authority

Whereas, the *STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY* located at *BLOOMINGTON, ILLINOIS* has applied for a certificate of authority and made the filings required of such Insurer:

Therefore, I, Dudley A. Guglielmo, the undersigned, Commissioner of Insurance, do hereby certify that the said *STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY* is authorized to transact its appropriate business of _____

HEALTH AND ACCIDENT, VEHICLE, LIABILITY, FIRE AND EXTENDED COVERAGE, STEAM BOILER AND SPRINKLER LEAKAGE, CROP AND LIVESTSOCK, MARINE AND TRANSPORTATION (Inland Marine).

_____Insurance in this State, in accordance with the laws thereof. This certificate shall remain in effect until cancelled, suspended, revoked, or the renewal thereof refused.

In Testimony Whereof, I hereunto subscribe my name, and affix the seal of my office at Baton Rouge,

this 23rd

day of March A.D. 1966

/s/ Dudley A. Guglielmo

Commissioner of Insurance

(SEAL)

STATE OF ILLINOIS
DEPARTMENT OF INSURANCE
SPRINGFIELD, ILLINOIS

(SEAL) I, the undersigned, Director of Insurance of the State of Illinois, hereby certify that the document to which this Certification is attached is a true and correct copy of the original now on file in and forming a part of the records of the Department of Insurance.

In witness whereof, I hereto set my hand and cause to be affixed the Seal of my office in Springfield, Illinois.

Date: SEP 30 1991 Stephen F. Selcke
Director of Insurance

IL 446-0135 (3/84)

STATE OF ILLINOIS

DEPARTMENT OF TRADE AND COMMERCE

Division of Insurance

Springfield, Illinois,

March 29, 1922.

I, GEORGE A . BARR, Director of Trade and Commerce of the State of Illinois, do hereby certify that I have examined the *Articles of Association for the STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY*, located at Bloomington, Illinois, and find the same to be in compliance with the provisions of an Act entitled, "*An Act to provide for the organization and management of mutual insurance corporations*, other than life; and repealing certain Acts and parts of Acts therein referred to"; approved June 29, 1915, in force July 1, 1915, and amendments thereto, and the same are hereby approved.

(SEAL)

In Testimony Whereof, I hereto subscribe my name, and affix the Seal of my office, at Springfield, the day and year first above written.

/s/ George A. Barr

Director of Trade and Commerce.

ATTEST:/s/ T. J. Houston
Superintendent of Insurance

To the Honorable *GEORGE A. BARR*
Director of Trade and Commerce of Illinois.

We, the undersigned, *Nicolas J. Schmitz, Charles Holz, J. W. Coale, Tobias Rhodes, L. E. Lingenfelter, H. F. Hoferkamp, Nicholas Walsh, R. H. Switzer, Milton Deatherage, Clyde Collins, A. L. Strange, William B. McFurland, A. O. Eruchtl, J. H. Barker, Joseph Jacqenot, H. J. King, Joseph F. Lewis, Jacob Epplin, John A. Nain; W. H. Bean, S. B. Mason and P. N. Jones.*

The majority of whom are bona fide residents of the State of Illinois, hereby associate ourselves together as a body corporate for the purpose of transacting insurance business on the mutual plan, under the provisions of an Act of the General Assembly of the State of Illinois, entitled "An Act to provide for the organization and management of mutual insurance corporations, other than life, and repealing certain Acts and parts of Acts therein referred to," approved June 29, 1915, in force July 1, 1915, and for the purpose of such organization subscribe to the following *ARTICLES OF ASSOCIATION and hereby certify as follows, to-wit:*

1. The name of such corporation shall be *STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY*

2. The principal or home office shall be located in *BLOOMINGTON* County of *McLEAN*, State of Illinois.

3. The purpose for which such corporation is formed is *To insure against loss, expense, and liability resulting from the ownership, maintenance or use of any*

automobile or other vehicle.

4. The names and addresses of those composing the Board of Directors in which the management of the company shall be vested until the first meeting of members are as follows, respectively, to-wit:

NAME.	CITY.	COUNTY.	STATE
J. J. Prator	Vandalia	Fayette	Illinois
William B. McFarland	Hoopeston	Vermilion	Illinois
Charles Holz	Buckley	Iroquois	Illinois
S. B. Mason	Bloomington	McLean	Illinois
J. W. Coale	Holder	McLean	Illinois
P. N. Jones	Bloomington	McLean	Illinois
G. J. Mocherle	Normal	McLean	Illinois

.....

5. The names and residences of incorporators are as follows, respectively, to-wit:

NAME.	CITY.	COUNTY.	STATE
Nicholas J. Schmitz	Chicago	Cook	Illinois
Charles Holz	Buckley	Iroquois	Illinois
J. W. Coale	Holder	McLean	Illinois
Tobias-Rhodes	Sullivan	Moultrie	Illinois
L. E. Lingenfelter	Ullin	Pulaski	Illinois
H. F. Hoferkamp	Mattoon	Coles	Illinois
Nicholas Walsh	Morris	Grundy	Illinois
R. H. Switzer	Secon	Woodford	Illinois

NAME.	CITY.	COUNTY.	STATE.
Milton Deothorage	Rio	Knox	Illinois
Clyde Collins	Rose Hill	Jasper	Illinois
A. L. Strange	Hillsboro	Montgomery	Illinois
William B. McFarland	Hoopeston	Vermilion	Illinois
A. O. Fruchtl	Sigol	Shelby	Illinois
J. H. Barker	Mazon	Grundy	Illinois
Joseph Jacqerot	Murphysboro	Jackson	Illinois
H. J. King	Carlock	McLean	Illinois
Joseph F. Lewis	Niota	Hancock	Illinois
Jacob Epplin	Pinckneyville	Perry	Illinois
John A. Main	Wadsworth	Lake	Illinois
W. H. Bean	Blue Mound	Macon	Illinois
S. B. Mason	Bloomington	McLean	Illinois
P. N. Jones	Bloomington	McLean	Illinois

6. The corporate powers shall be exercised by a Board of Directors elected by the members of the company at the annual meeting. In all elections for directors each member shall have the right to vote in person or by proxy, as provided by the By-Laws. The Board of Directors shall fill all vacancies until the next annual meeting. The number of Directors and their terms of office shall be fixed and governed by the By-Laws.

7. The Board of Directors shall elect a president, a vice-president, a secretary and such other officers as they may deem necessary, who shall hold their offices for the period of *three years*, or until their successors are duly

elected and have qualified, and the Board of Directors shall fill any vacancy in any such office. *They shall adopt By-Laws for their own government and the government for the officers of the company, not inconsistent with the Articles of Association,* and the Act under which the company is incorporated and all Amendments thereto, and the Constitution and Laws of the United States and of this State, and shall have the control, direction and management of the affairs of the company. They shall meet regularly, at times to be fixed by the By-Laws, and at such meetings shall receive from the offices and give such directions as to them shall seem to be for the best interests of the company. They shall rquire all of the officers and agents of the company who have control of or handle any of its funds to give bonds which in their discretion it may be deemed necessary, with such sureties and conditions as they shall deem proper, and may remove any officer when the interest of the company shall require, as provided by the By-Laws.

8. The qualifications of members of the company shall be prescribed by the By-Laws. In any regular or special meeting of policy holders each member shall be entitled to one vote and *twenty* members present in person or by proxy shall constitute a quorum for the transaction of business. *These Articles of Association may be amended at any time in accordance with law.*

In witness whereof we hereunto subscribe our names and certify that the above is the Articles of Association for the organization of the *STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY* this 31st day of January A.D. 1922.

Signed Signatures

Nicholas J. Schmitz	[SEAL]	517 W.North Ave, Chicago, Ill[SEAL]
Charles Holz	[SEAL]	Buckley, Ill [SEAL]
J. W. Coale	[SEAL]	Holder, Ill. [SEAL]
Tobias Rhodes	[SEAL]	Sullivan, Ill. [SEAL]
L. E. Ligenfelter	[SEAL]	Ullin, Ill. [SEAL]
H. F. Hoferkamp	[SEAL]	Mattoon, Ill. [SEAL]
Nicholas Walsh	[SEAL]	Morris, Ill. [SEAL]
R. H. Switzer	[SEAL]	Secon, Ill. [SEAL]
Milton Deothorage	[SEAL]	Rio,Ill. [SEAL]
Clyde Collins	[SEAL]	Rose Hill Ill. [SEAL]
A. L. Strange	[SEAL]	Hillsboro Ill. [SEAL]
William B. McFarland	[SEAL]	Hoopeston Ill.
A. O. Fruchtl	[SEAL]	Sigel Ill. [SEAL]
J. H. Barker	[SEAL]	Mazon Ill. [SEAL]
Joseph Jacqerot	[SEAL]	Murphysboro Ill. [SEAL]
H. J. King	[SEAL]	Carlock Ill. [SEAL]
Joseph F. Lewis	[SEAL]	Niota Ill. [SEAL]
Jacob Epplin	[SEAL]	Pinckneyville Ill. [SEAL]
John A. Main	[SEAL]	Wadsworth Ill. [SEAL]

Signed Signatures

W. H. Bean	[SEAL]	Blue Mound Ill. [SEAL]
S. B. Mason	[SEAL]	Bloomington Ill. [SEAL]
P. N. Jones	[SEAL]	Bloomington Ill. [SEAL]

(3)

Supreme Court, U.S.
FILED
APR 15 1994
OFFICE OF THE CLERK

NO. 93-1393

In the Supreme Court of the United States

OCTOBER TERM, 1993

STEPHEN AND MALVINA GALLODORO
Petitioners

vs.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITIONERS WRIT OF CERTIORARI

EVANGELINE M. VAVRICK
LAW OFFICES OF
EVANGELINE M. VAVRICK
912 Louisiana Avenue
New Orleans, LA 70115
Telephone: (504) 899-5555

Attorney for Petitioners
Stephen and Malvina Gallodoro

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

MAY IT PLEASE THE COURT

RESPONSE TO RESPONDENTS BRIEF

Respondent has paid a judgment, inclusive of principal interest and costs which judgment became executory on December 28, 1993, upon issuance of the mandate of the Fifth Circuit.

Respondent did not apply for a stay of mandate, tendered the check in the exact amount of the judgment and attempted to secure a receipt and release of all claims when tendering the amount owed and judicially collectable.

No receipt and release were executed by petitioners, nor was one agreed upon or due. There was no consideration for the release.

This case was in active litigation for four years. Not until the judgment became executory did respondent tender an unrestricted check for the amount owed pursuant to the judgment and nothing more.

Respondent admits in his argument that the draft was in full payment of the judgment.

While it may have been the intent of respondent that the payment of the judgment was in full settlement, the payment of the judgment and nothing more can only be construed as payment for those issues resolved in judgment. The payment was accepted as payment of the judgment upon which petitioners could execute and nothing more.

Respondent confuses the significance of its obligation pursuant to the court judgment.

PRIMA FACIAS PROOF OF LACK OF INCORPORATION AND LACK OF JURISDICTION

Respondent's proof of corporate status consisted entirely of Articles of Association. (Respondent's Appendix B-1), Company's Certificate of Authority issued by the Insurance Commissioner of the State of Louisiana (Respondent's Appendix B-6). Respondent's entire proof is reproduced in its reply brief.

Patent on the record is that State Farm Mutual Automobile Insurance Company has no authority from the Secretary of State of the State of Illinois, pursuant to whose authority corporate charters are issued. State Farm has no corporate charter from any state.

Patent on the face of the record is the absence of documentary qualification as a foreign corporation qualified to do and doing business in the State of Louisiana with whom foreign corporations must register.

The use of the word "corporation" interchangably with the use of the word association in the Articles of Association do not render this mutual association a corporation.

State Farm is by virtue of its Articles of Association a limited partnership.

It is an artificial entity created by the insurance code of the State of Illinois not the corporate law of the state.

In *Great Southern Fire Proof Hotel Co. v. Jones,* 172 U.S. 499, 20 S.Ct. 690 this court held that a limited partnership association (which State Farm is) although possessing "some of the characteristics of a corporation" and deemed a citizen by the law creating it may not be deemed a citizen under the jurisdiction established for corporations.

CONCLUSION

A study of State Farm's Articles of Association, the State Farm Policy and internal organization lead to the inescaple conclusion that State Farm is not a corporation but a limited partnership and that federal diversity does not exist nor has it ever existed.

Respectfully submitted,

LAW OFFICES OF
EVANGELINE M. VAVRICK
912 Louisiana Avenue
New Orleans, LA 70115
(504) 899-5555

Evangeline M. Vavrick

PROOF OF SERVICE

I, Evangeline M. Vavrick, attorney for the petitioners hereby certify that on this day, I have served copies of the foregoing Reply Brief on:

Matthew J. Ungarino
Law Offices of Matthew J. Ungarino
1470 One Lakeway Center
3900 North Causeway Boulevard
Metairie, Louisiana 70001
Attorney for Respondent

By mailing a copy thereof, postage prepaid addressed to his office, this 15th day of April, 1994.

EVANGELINE M. VAVRICK

APPENDIX A

December 20, 1993

Mr. Matthew J. Ungarino
1470 One Lakeway Center
3900 North Causeway Boulevard
Metairie, LA 70002

RE: Stephen and Malvina Gallodore
v. State Farm Insurance Company
No. 92-3898, U.S. Court of Appeals

Dear Mr. Ungarino:

It is my understanding that your office called relative to the above matter.

According to my calculations there is $70,864.00 due.

Principal =		$52,933.84	
Interest =		$14,842.51	
11/29/90	to	12/31/90:	11.5%
1/01/91	to	12/31/91:	11.0%
1/01/92	to	12/31/92:	9.0%
1/01/93	to	12/31/93:	7.0%
Costs =		$ 3,087.65	

The judgment will become executory on December 28th.

Very sincerely,

LAW OFFICES OF EVANGELINE M. VAVRICK

_____

Evangeline M. Vavrick

EMV/flr
c.c. Stephen and Malvina Gallodoro

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
OCT 8 92

STEPHEN GALLODORO, ET AL	CIVIL ACTION
versus	NUMBER 90-5025
STATE FARM INSURANCE COMPANY	SECTION "M" (4)

AMENDED JUDGMENT

The undersigned Magistrate Judge entered a Judgment in this cause on September 10, 1992. On September 17, 1992, defendant filed a motion to amend the judgment as it pertained to the pre-judgment judicial interest rate. In considering this motion, we found that Louisiana law allows for multiple interest rates on judgments pursuant to Civil Code article 2924. LSA - CC art. 2924 (West Supp. 1992).[1] We therefore hereby amend the September 10, 1992 Judgment to read as follows:

This case came on for trial on April 27, 1992 and concluded on September 9, 1992.

---

[1] See Our Minute Entry in this case dated October 7, 1992 wherein we granted defendant's Motion to Amend the Judgment.

DATE OF ENTRY OCT 08 1992

After reviewing the record, the evidence and the law, and for the reasons orally assigned on the record in Court, and further considering the direction of the Court as to the entry of judgment, accordingly.

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiffs, Stephen Gallodoro and Malvina Gallodoro, and against defendant, State Farm Insurance Company, in the full sum of $52,933.84, together with interest at the rate of: a) 11.5% per annum from November 29, 1990 through December 31, 1990; b) 11% per annum for the calendar year 1991; and c) 9% per annum from January 1, 1992 through the date of judgment, and for costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this amended Judgment be entered *nunc pro tunc* as of September 10, 1992, the date the original judgment was entered in this case.

New Orleans, Louisiana, this 7 day of October, 1992

/s/ Ronald A. Fonseca

RONALD A. FONSECA
United States Magistrate Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-6514
600CAMP STREET
NEW ORLEANS, LA 70130

December 29, 1993

Mrs. Loretta G. Whyte, Clerk
U.S. District Court
500 Camp Street, Rm. 104
New Orleans, LA 70130

No. 92-3898 - GALLODORO & GALLODORO v. STATE FARM INS. CO.
(D. C. No. 90-CV-5025-M4)

(X) Enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

( ) Enclosed to you only is a certified copy of the Rule 47.6 Decision in the above case issued as and for the mandate.

( ) The Court having denied the motion for stay of mandate, enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

Enclosed herewith are the following additional documents:

(X) Copy of the Court's opinion.

(X) Original record on appeal or review. (11) Volumes

(X) Other original papers forwarded with record.
( ) Envelope (1) Box

(X) Bill of Costs approved by this Court.
(X) Copy enclosed to counsel.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

BY: /s/ Connie Boersma
Deputy Clerk

cc: (Letter Only)
Mag. Ronald Fonseca
Ms. Evangeline M. Vavrick
Mr. Matthew J. Ungarino